Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

PAUL MICHAEL SAWYER,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether municipal police officers, outside the state of their commission, may act under color of law against a citizen of another state, in violation of the laws of both States, without violating the Bill of Rights of the Constitution?

Whether Fourth Amendment reasonableness analysis requires that federal courts respect the fundamental right of States to regulate Police Powers within their respective borders?

Whether Fourth Amendment reasonableness analysis requires that federal courts respect the fundamental right of States to regulate the Police Powers of their respective law enforcement officers?

Whether Fourth Amendment reasonableness analysis requires that federal courts give deference to the reasonableness determination of the highest court of a state?

## RULE 14.1(b) DISCLOSURE

All parties are disclosed by the caption and style of this Petition and no corporate relationships are relevant to this Petition.

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## BASIS FOR JURISDICTION

i. Date the judgment sought to be reviewed:

March 20, 2006

ii. Date of any order respecting rehearing:

Not applicable

iii. Date of any cross-petition: Not applicable

iv. Statutory provision conferring jurisdiction: 28 U.S.C. § 1254(1)

v. Rule 29.4(a) and (b) notifications: Not applicable

## CONSTITUTIONAL PROVISIONS

### United States Constitution: Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.

### United States Constitution: Fourteenth Amendment, Section 1

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### United States Constitution: Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively, or to the people.

**Oklahoma Constitution, Article 2, Section 30**

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.

## STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of Oklahoma, where Mr. Sawyer was indicted under the provisions of 18 U.S.C. § 371 [conspiracy to possess stolen property that had traveled interstate, 18 U.S.C. § 2315, and a second count, possession with intent to sell motorcycle engines with altered or obliterated vehicle identification numbers, 18 U.S.C. § 2321(a). The issue of decision in the District Court was whether evidence seized by police officers from Kansas, acting under color of law in Oklahoma, and contrary to the law of both States, should be admissible in a federal criminal trial.

The District Court certified a question of law to the Oklahoma Court of Criminal Appeals and ultimately entered an order suppressing all of the seized evidence, resulting in the dismissal of the case against Mr. Sawyer. The Government appealed that decision to the Tenth Circuit Court of Appeals, which reversed the order of the

District Court. Mr. Sawyer seeks a review by this Court by a Petition for Certiorari.

## SUMMARY OF FACTS

On August 18, 2000, two (2) police officers from the Lawrence, Kansas Police Department, Detectives M.T. Brown and Jack Cross, traveled from Kansas to Bartlesville, Oklahoma, to interrogate Mr. Sawyer, and search his property, in connection with an investigation which the detectives were handling involving stolen motorcycle motors. Both officers were visibly wearing badges, firearms, handcuffs, pagers and phones.

Bartlesville, Oklahoma, police officers had not initiated a request for the Lawrence, Kansas, officers to come to the city, and Brown and Cross acted entirely independent of any local, state or federal law enforcement agencies. The officers initially went to a small shop in Bartlesville where Mr. Sawyer conducted a side business of sales of motorcycle engines, and knocked on the door, but no one answered. A person working at a nearby business told Brown and Cross that Mr. Sawyer worked at Reda Pump, and they proceeded to that location.

Brown and Cross spoke with a manager or other person in charge at Reda Pump, informing him that they needed to speak with Mr. Sawyer. The officers were escorted to a large conference room, where they interviewed Mr. Sawyer. Mr. Sawyer was informed that he was not under arrest and that Brown and Cross did not have authority, at that time, to arrest him. Officer Brown read *Miranda* warnings from a card that had been issued to the Lawrence Police Department by their district attorney's

office, and he interrogated Mr. Sawyer for more than an hour. Brown and Cross then asked Mr. Sawyer to take them to his motorcycle engine shop, and they followed him there. After their arrival, Mr. Sawyer was asked to sign an official "Consent to Search" form provided to him by Brown and Cross, bearing the letterhead of the Lawrence, Kansas Police department.

Brown and Cross moved forward with the search of Mr. Sawyer's shop, examining the motorcycle engines located therein. At some point nearing the end of the search, Brown and Cross contacted the Bartlesville Police Department to request a camera to be brought to the location. Three Bartlesville officers came to the scene, took photographs and seized six (6) engines, which purportedly had altered numbers, at the request of Brown and Cross.

Officers Brown and Cross also removed Mr. Sawyer's records from his office and subsequently went to Mr. Sawyer's residence, where they obtained additional records from Mr. Sawyer's wife relating to the investigation. Thereafter, Mr. Sawyer was interrogated again at the Bartlesville Police Department by Brown and Cross. Mr. Sawyer was allowed to leave after that interview was concluded.

On August 22, 2000, Brown and Cross notified the Bartlesville police officers of the results of their examination of the serial numbers on the engines found at Mr. Sawyer's shop. The following day, the Bartlesville officers obtained a search warrant from a state court judge for a search of Mr. Sawyer's shop. The search warrant affidavit, prepared by Bartlesville police officers, contained information which was conveyed to them by officers Brown and Cross. That warrant resulted in the seizure of seventeen

(17) additional motorcycle motors, among other items of evidence.

Mr. Sawyer was indicted in the Northern District of Oklahoma on October 10, 2003, more than three (3) years after the search and seizures at issue here.

## REASONS FOR GRANTING THE PETITION IN THIS CASE

A. The decision of the Tenth Circuit Court of Appeals in this important matter conflicts with a decision of the Oklahoma Court of Criminal Appeals, a court of last resort. Rule 10(a), Rules of the Supreme Court, provides in pertinent part:

> "a United States Court of Appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort . . . "

As will be discussed below, the United States District Court certified a question to Oklahoma's Court of Criminal Appeals. That Court ruled that the search of Mr. Sawyer's property was invalid because the officers who obtained his consent to search were acting outside their jurisdiction in contravention of Oklahoma law. Therefore, because of the conflict between Oklahoma's court of last resort on the issue and the Circuit Court of Appeals, this Court should grant this Petition.

B. Compelling reasons exist for this Court to resolve the important issue of whether the Constitution honors the right of States to regulate police power within their respective borders. (Rule 10. *Id.*)

If the opinion of the Court of Appeals is allowed to stand, states will no longer have the right to regulate the illegal exercise of police powers within their respective borders. Under the Court of Appeal's rationale, the fruits of such illegal conduct are readily admissible in any federal court. Due to the significance of the Court of Appeals decision impacting the rights of the states, this is an additional reason that this Court should grant this Petition.

## ARGUMENT AND AUTHORITIES

### A. Under our federal system of government, police powers are the exclusive constitutional preserve of the respective States.

The United States Constitution created a federal government of limited, enumerated and delegated powers, and the federal government cannot exercise any power unless specifically granted by the United States Constitution either expressly or by implication. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110, 56 S.Ct. 374, 80 L.Ed. 513 (1936).

The Framers of the Constitution deliberately crafted the federal system to ensure that the rights of citizens would be better protected by the division of authority among the states and federal government. *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658,

(2000); *Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967).

> "In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states and cannot be assumed by the national government, and that in this respect it is not interfered with by the fourteenth amendment."

*Wilkerson v. Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1891).

Under our federal system, the "police power," *e.g.*, the responsibility and authority for promulgating and enforcing the criminal law rests with the respective states. U.S. Const., Amend. X; *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Moore v. People of State of Illinois*, 55 U.S. 13, 14 How. 13, 14 L.Ed. 306 (1852); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R.2d 1396 (1952).

" [E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161, 12 S.Ct. 375, 382, 36 L.Ed. 103 (1892).

This form of supreme sovereignty of each State over the property and persons within their borders was inherited from the Articles of Confederation, Article II of which declared:

> "Article II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

By passage of the Constitution, the States surrendered certain specific and well-defined powers to the federal Congress, reserving the rest for their respective and exclusive jurisdiction. Thus, with respect to any given State, law enforcement officers of other states have no right to act under color of law within its borders without its consent.

**B. Because of Oklahoma's independent right to regulate the exercise of police powers within its borders, the admission in a federal court of evidence illegally seized by extra-territorial law enforcement officers is the corollary of the "silver platter doctrine" and should not be allowed.**

It is a fundamental principle of federal constitutional law that evidence obtained by illegal conduct of the police may not be used to convict a defendant as it is the "fruit of the poisonous tree." *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court concluded that evidence which was the "fruit" of unlawful police action must be excluded as the "fruit of the poisonous tree."

In *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 777 (1964), this Court held that state officers would be held to the same standard as federal officers in determining whether their actions violated the rights of individuals with whom they encounter. Mr. Sawyer observes that these municipal police officers from Lawrence, Kansas enjoy no special immunity and they should be judged by the same standards as certified federal officers.

For example, the Federal Bureau of Investigation adheres to the following "core values":

> "Rigorous obedience to the Constitution of the United States;
> Respect for the dignity of all those we protect;
> Compassion;
> Fairness;
> Uncompromising personal integrity and institutional integrity;
> Accountability by accepting responsibility for our actions and decisions and the consequences of our actions and decisions; and
> Leadership, both personal and professional."

Source: http://www.fbijobs.gov/31.asp#1

Municipal police officers, acting under color of law, outside the auspices of their supervisors and fellow officers, have no constraints whatsoever on their actions, and certainly may not have been sufficiently trained to know and follow the law. Giving them unfettered police powers in any other state, subverts many of the principals upon which this nation was founded.

Justice Stevens noted in his dissent in *Arizona v. Evans*:

> "The [Fourth] Amendment protects the fundamental 'right of the people to be secure in their persons, houses, papers, and effects,' against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its agents. See *Olmstead v. United States*, 277 U.S. 438, 472-479, 48 S.Ct. 564, 570-573, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). The remedy for

> its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations."

*Arizona v. Evans,* 514 U.S. 1, 18, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). The impact of unauthorized police powers upon citizens is too immense to be brushed aside with a myopic view that so long as no coercion is employed to obtain a consent to intrude into the privacy of a citizen, then that ends the inquiry.

In an earlier decision, this Court emphasized the danger of allowing law enforcement officers to determine what is, and what is not, the lawful exercise of police powers:

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

*McDonald v. United States,* 335 U.S. 451, 455-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

*Wolf v. Colorado,* 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949), reminds us that the Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police . . . "

If law enforcement understands that the fruits of an unlawful search by state agents will be inadmissible in a

federal trial, there would be no inducement for subterfuge and invasion of rights with respect to Federal/State cooperation and criminal investigation. If the search is invalid in state court, then the fruits of the search should be inadmissible in federal court as a violation of the Constitution. To hold otherwise would be to allow State and Federal law enforcement to pick and choose between federal and state courts to avoid the protections embodied in the Bill of Rights, as clearly happened in this case.[1]

In *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), the Supreme Court anticipated the issue presented today, albeit from the corollary perspective:

> "Free and open cooperation between State and Federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such an association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom.... [W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat

[1] It is worth noting that Kansas law prohibits the same law enforcement activity at issue here. Kansas statutes, as well as court decisions prohibit the type of police misconduct engaged in by Officers Brown and Cross. *State v. Sodders*, 872 P.2d 736, 255 Kan. 79 (1994).

> the state's effort to assure obedience to the Federal Constitution."

*Elkins* at 364 U.S. 221.

In *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927), the Court ruled that when a federal agent, acting jointly with local officers, and conducts an unlawful search, then the exclusionary rule applies. In *Gambino v. United States*, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927), the Court excluded evidence illegally seized by state agents in a federal proceeding.

These officers violated the clear statutory language of both Oklahoma and Kansas prohibiting them from exercising official police power outside of the boundaries of their jurisdiction. They were not asked by any local or federal law enforcement agency to conduct a search of Petitioner's shop or to seize his records. There were no exigent circumstances. The effect of the Tenth Circuit's opinion is the reverse of the "silver platter doctrine," which was abolished in *Elkins*. Encouraging state law enforcement officers to violate the laws of their respective states, as well as the law of the state in which they act, by searching and seizing evidence admitted in the federal courts brings to the forefront the purpose and policy behind the exclusionary rule.

> "The [exclusionary] rule is calculated to prevent, not repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it."

*Elkins* at p. 217.

Notwithstanding the foregoing, the Tenth Circuit's decision creates potential conflicts between states. Oklahoma's Court of Criminal Appeals has stated unequivocally that extra-territorial law enforcement officers act illegally when purporting to act under color of law in Oklahoma.[2] Tragically, the Tenth Circuit's decision, unless reversed and vacated, offers alien law enforcement officers an easy and tempting path to defying the sovereignty of the State of Oklahoma: Simply do as they like, without regard to state law, and then escape to a federal court.[3]

Echoing the classic admonition in *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

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[2] Kansas undoubtedly would not tolerate such actions by Oklahoma police officers.

[3] The logical extension of the Circuit's ruling would invite even foreign law enforcement officers to invade the rights of Oklahomans.

To give every local cop nationwide jurisdiction to act under color of law opens a Pandora's box of other potential problems. Would such a rule abolish liability for flagrant violations of civil rights by such officers? The Lawrence, Kansas Police Department would certainly resist suit in Oklahoma courts.[4]

In the case of *Gonzales v. Oregon*, 546 U.S. ___, 126 S.Ct. 94, ___ L.Ed.2d ___ (2006), the Court struck down the Attorney General's interpretation of the law that physician-assisted suicide would violate the Controlled Substances Act, allowing the states to regulate the practice. Clearly, states must be free to regulate conduct within their borders.

The federal courts should discourage, rather than encourage officers from violating the laws of the respective states.

### C. The District Court for the Northern District of Oklahoma properly deferred to Oklahoma's fundamental right to regulate the exercise of police powers within its own borders.

Contrary to the assertions of the Tenth Circuit that there was no coercion, the Oklahoma Court of Criminal Appeals held that Officers Cross and Brown were *inherently* coercive by the manner in which they obtained the

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[4] A legitimate question arises whether these officers would be able to avail themselves of the "qualified immunity" defense in a civil rights suit. As the Court noted in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), "it [the qualified immunity defense] provides ample protection to all but the plainly incompetent or those who knowingly violate the law."

consent to search: "It is evident these officers were not acting as private citizens and, through their display of official authority, they obtained consent to search from Defendant." *United States v. Sawyer*, 2004 OK CR 22, 92 P.3d 707.

Although there is no suggestion that any physical force was used, or any threats were made to induce Mr. Sawyer to consent to the search of his premises, the District Court concluded, and the Oklahoma Court of Criminal Appeals agreed, that Brown and Cross acted under color of law in a manner that was *inherently* coercive. It is noteworthy that the Kansas officers were able to secure a private conference room from a person in charge at Petitioner's place of employment, by carrying firearms and wearing police department badges. The officers did not leave Sawyer a readily accessible means of exit while interrogating him at his place of employment.[5]

Under the facts, it is apparent that Mr. Sawyer acquiesced to a claim of lawful authority, which the Kansas officers did not have. Brown and Cross should have discontinued their involvement in the investigation/search when they were not assisted by local police officers. At this point, they should have turned this part of

[5] District Judge Holmes noted that the Kansas officers' show of authority had a parallel coercive effect on Mr. Sawyer's employer who would have been unlikely to pull Mr. Sawyer off his job to be interrogated in a private conference room had they not been acting under color of law. Thus, they were able to capitalize on the reasonable belief that his employer expected Mr. Sawyer to cooperate, thereby compounding the coercion.

the investigation over to federal or Oklahoma law enforcement agencies.[6]

In its opinion, the Court of Appeals correctly states that federal law governs the question of whether consent is valid. It goes on to state that, under *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) consent is valid if it is "freely and voluntarily given" and that the federal test for determining the validity of consent to search requires a factual determination based upon the totality of the circumstances surrounding the consent:

> "The federal test for determining the validity of consent to search does not require a district court to consider whether a law enforcement officer has authority under state law to request consent." Opinion of Court of Appeals, Appendix p. 10.

In *Schneckloth*, there was never a question that the officer was within his jurisdiction at the time he conducted the traffic stop. The facts presented in that case specifically state:

> "While on routine patrol in Sunnyvale, California . . . Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out, . . . " 412 U.S. 218, 220.

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[6] The Tenth Circuit, did not address this issue specifically, stating that since Petitioner did not challenge by cross-appeal the District Court's finding of voluntariness, pronounced from the bench prior to receiving the answer to the certified question from the Court of Criminal Appeals, the issue was "not before us." Decision of Tenth Circuit, page 8, Appendix p. 8.

Consequently, the *Schneckloth* Court was not called upon to address the officer's jurisdictional authority when rendering the opinion. The application of *Schneckloth*, presumes that the officer obtaining the "freely and voluntarily given" consent to search is acting within his jurisdiction, and it is therefore within the limits of his authority to request consent and conduct a search. However, in the instant case, the application of the federal test is faulty *specifically because* of that presumption. By ignoring the obvious factual distinction with *Schneckloth* the Court of Appeals has compared apples to oranges and then attempted to make lemonade.

## CONCLUSION

Mr. Sawyer has demonstrated that the Tenth Circuit Court of Appeals has made a decision that is in direct conflict with the decision of the Oklahoma Court of Criminal Appeals, and that compelling reasons exist for this Court to resolve the important issue involving the right of states to regulate the exercise of illegal police powers within their borders. Mr. Sawyer therefore respectfully asks this Court to grant the petition in this case.

Dated this 15th day of June, 2006.

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441 F.3d 890

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellant,<br>v.<br>PAUL MICHAEL SAWYER, also known as Motor Mike, also known as Mike Paul Sawyer,<br>Defendant-Appellee. | No. 05-5002 |

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**Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 03-CR-145-H)**

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(Filed Mar. 20, 2006)

Richard A. Friedman, Assistant United States Attorney, Washington, D.C. (David C. O'Meilia, United States Attorney, and Leena Alam, Assistant United States Attorney, with him on the briefs, Tulsa, Oklahoma) for Plaintiff-Appellant.

Stanley D. Monroe, Tulsa, Oklahoma, for Defendant-Appellee.

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Before **PORFILIO** and **EBEL**, Circuit Judges, and **HERRERA**, District Judge.*

**HERRERA**, District Judge.

The Government appeals the district court's order granting Defendant Paul Michael Sawyer's ("Defendant") motion to suppress evidence. We exercise jurisdiction under 18 U.S.C. Section 3731 and reverse.

## I. Factual Background.

On August 17, 2000, Detectives Michael Todd Brown and Jack Cross of the Lawrence, Kansas Police Department (the "Kansas Officers") decided to pursue an investigation into a stolen motorcycle ring by traveling to Bartlesville, Oklahoma to interview Defendant Paul Michael Sawyer ("Defendant"). In preparation for their trip, the Kansas Officers attempted to telephone Sergeant Jay Hastings of the Bartlesville Police Department on August 17 and August 18, 2000. The Kansas Officers were unable to speak with Sergeant Hastings, but left a message for Hastings on August 18, 2000.

On August 18, 2000, the Kansas Officers departed for Bartlesville in attempt to locate and interview Defendant. Upon their arrival in Bartlesville, the Kansas Officers stopped first at the Bartlesville Police Department hoping to find a Bartlesville police officer to accompany them. No Bartlesville officers were available.

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* Honorable Judith C. Herrera, United States District Judge for the District of New Mexico, sitting by designation.

The Kansas Officers proceeded to Defendant's motorcycle shop, where Defendant conducted a business of motorcycle sales. When the officers knocked on the door of the business, no one answered. An individual at a nearby business informed the Kansas Officers that Defendant was employed by Reda Pump. The Kansas Officers proceeded to Reda Pump, where they informed the manager, or person in charge, that they needed to speak with Defendant. Detective Brown was wearing his badge, firearm, handcuffs, phone, and pager on his belt. Detective Cross was wearing similar equipment on his belt. The Kansas Officers either presented their badges to the manager or their badges were visible to the manager during the conversation. The manager directed the Kansas Officers to a large conference room located on the business's premises, where the officers waited for Defendant. Thereafter, the manager brought Defendant to the conference room and left.

Detective Brown informed Defendant that he and Detective Cross were police officers from Lawrence, Kansas investigating crimes that had occurred in their jurisdiction. Detective Brown further indicated that Defendant was not under arrest and that he and Detective Cross did not have authority to arrest Defendant. Detective Brown also advised Defendant of his *Miranda* rights, using a blue card that the local district attorney's office had issued to the Lawrence, Kansas Police Department. Thereafter, Detective Brown asked Defendant if he would speak with them, and Defendant responded in the affirmative. The Kansas Officers conversed with Defendant for approximately one hour.

During the interview, Detective Brown asked Defendant to prepare a written statement, and Defendant

agreed. The Kansas Officers provided Defendant with a Lawrence, Kansas Police Department form on which to write a statement. After Defendant finished writing the statement, Detective Brown asked whether Defendant would take him and Detective Cross to Defendant's motorcycle shop, and Defendant agreed.

The Kansas Officers, driving their police vehicle, followed Defendant, who was driving his own vehicle, to the shop. Upon their arrival, Defendant unlocked the door and allowed the Kansas Officers to enter. Once inside, the Kansas Officers requested that Defendant consent to a search of the premises by completing and signing an official Lawrence, Kansas Police Department consent form. The Kansas Officers explained that they wanted to formalize Defendant's consent to search so that they could have it for their records. Defendant signed the form.

The Kansas Officers began to search the motorcycle shop, and when they were concluding their search, the officers contacted the Bartlesville Police Department to request that a Bartlesville officer bring a camera to the shop. Three Bartlesville officers arrived on the scene, took photographs, and at the request of the Kansas Officers, seized six engines. The Kansas Officers took Defendant's records from his office and subsequently proceeded to Defendant's residence where they obtained additional records from Defendant's wife. Thereafter, the Kansas Officers further interviewed Defendant at the Bartlesville Police Department.

At some point between August 19, 2000, and August 23, 2000, the Kansas Officers notified the Bartlesville police officers of the results of their examination of the serial numbers on the engines that they had seized from

Defendant's shop. The following day, the Bartlesville officers obtained a search warrant from an Oklahoma state court judge authorizing a second search of Defendant's shop, using the information obtained by the Kansas Officers from the first search as the basis for their warrant application. The warrant resulted in the seizure of seventeen additional motorcycle engines.

The Kansas Officers at all times were acting in furtherance of an investigation on behalf of the Lawrence, Kansas Police Department. The Kansas Officers did not at any time act, or purport to act, as private citizens or volunteers. Rather, at all times, the Kansas Officers represented themselves as acting on official business.

## II. Procedural Background.

On October 10, 2003, the Government indicted Defendant in the Northern District of Oklahoma, charging him with conspiracy to possess stolen property, which had traveled in interstate commerce, in violation of 18 U.S.C. Section 371, and possession of motorcycle engines with altered or obliterated vehicle identification numbers, with the intent to sell such engines, in violation of 18 U.S.C. Section 2321. On November 14, 2003, Defendant filed a motion to suppress, arguing that the district court should suppress all evidence obtained from both searches of his motorcycle shop on the ground that the Kansas Officers lacked authority to conduct an investigation in Oklahoma and that his consent to search therefore was invalid.

After conducting evidentiary hearings on December 1, 2003, and December 4, 2003, the district court certified the following question to the Oklahoma Court of Criminal Appeals:

> Whether police officers from Lawrence, Kansas, who identified themselves as police officers to the owner of a building located in Bartlesville, Oklahoma, but informed the owner prior to requesting consent to search that they were from Kansas and without authority to arrest him, could legally conduct such a search in Oklahoma, and whether the fruits of the subsequent search are admissible in evidence, considering that both Oklahoma and Kansas have statutory prohibitions against police officers acting in their official capacities outside their respective jurisdictions?

On June 8, 2004, in a three-two decision, the Oklahoma Court of Criminal Appeals ruled that the Kansas Officers lacked authority to request consent to search Defendant's business. *United States v. Sawyer*, 92 P.3d 707, 709-10 (Ok. Ct. Crim. App. 2004), App. 181-82. The Oklahoma court ruled that the detectives lawfully could be present and conduct an investigation in Oklahoma, but lawfully could not conduct a search or seizure. *Id.* at 710 n.3, App. 182. Because the Kansas Officers obtained Defendant's consent to search while representing themselves as officers on official business, the Oklahoma court held that Defendant's consent to search was invalid under state law. *Id.* at 710 & n.3, App. 182. The Oklahoma court stated that the fruits of that search should be suppressed under the Fourth Amendment. *Id.* at 710-11, App. 182-83.

After receiving the Oklahoma court's response to the certified question and conducting a further hearing for argument by counsel on August 13, 2004, the district court granted Defendant's motion to suppress. Although the court concluded during the hearings that Defendant's consent to search voluntarily was given, *see* 12/4/03 Tr. at 77-78, App. 139-40; *see also id.* at 65, 72, 79, App. 127, 134,

141; 2/4/04 Tr. at 13, App. 160; 8/13/04 Tr. at 28, App. 215, the district court nonetheless held that, "because the Kansas officers could not lawfully request consent[,] . . . the search in this case is constitutionally infirm" and "the fruits of that illegal search cannot be used as evidence in this case," *Sawyer,* No. 03-CR-145-H, slip. op. at 14, App. 236.

## III. Discussion.

"It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is *per se* unreasonable . . . subject to only a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973) (citations and internal quotation marks omitted). "It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Id.* (citations omitted). Federal law governs the question whether consent is valid, even though the police actions are those of state police officers. *See United States v. Miller,* 452 F.2d 731, 733 (10th Cir. 1971) (citations omitted). Under federal law, consent is valid if it is "'freely and voluntarily given.'" *Schneckloth,* 412 U.S. at 222 (quoting *Bumper v. North Carolina,* 391 U.S. 543, 548 (1968)). The validity of consent to search requires a factual determination based upon the totality of the circumstances of whether the consent was "the product of an essentially free and unconstrained choice by [the] maker," *id.* at 225, or whether it was "the product of duress or coercion, express or implied," *id.* at 227.

The district court found that the consent secured by the Kansas Officers was voluntary and not the product of duress.[1] That finding is not challenged here.[2] Rather, on appeal, the Government contends that the district court erred when it held that Defendant's consent to conduct the initial search of the premises of his business, although voluntary, was nonetheless invalid because the Kansas Officers were acting outside of their jurisdiction in violation of Oklahoma law.

"In reviewing a district court's ruling on a motion to suppress evidence, we view the evidence in the light most favorable to the prevailing party." *United States v. Oliver*, 363 F.3d 1061, 1065 (10th Cir. 2004) (citation and internal quotation marks omitted). We accept the district court's findings of fact unless they are clearly erroneous. *Id.* "The ultimate question of whether a search and seizure was

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[1] Although the district court did not address the voluntariness of Defendant's consent in its written opinion, during the hearings on the motion to suppress, the court found that Defendant's consent met the voluntariness requirements of the Fourth Amendment. *See* 12/4/03 Tr. at 77-78, App. 139-40; *see also id.* at 65, 72, 79, App. 127, 134, 141; 2/4/04 Tr. at 13, App. 160; 8/13/04 Tr. at 28, App. 215. Because the record on this point is sufficiently clear, we need not remand this case for a written finding. *See United States v. King*, 222 F.3d 1280, 1283 n.2 (10th Cir. 2000) (declining to remand where the record was "sufficiently detailed and developed"); *United States v. Soto*, 988 F.2d 1548, 1554-55 (10th Cir. 1993) (declining to remand despite lack of specific findings where the relevant facts were undisputed).

[2] Defendant does not cross-appeal the district court's decision, including the district court's finding of voluntariness or the court's failure to find that Defendant was seized or otherwise coerced. Accordingly, the voluntariness of the search, as well as the question whether Defendant was seized for purposes of the Fourth Amendment, are not before us for review. We therefore do not consider Defendant's arguments related to these issues. *See* Answer Br. at 16-17 (setting forth case law and argument regarding seizure and voluntariness).

reasonable under the Fourth Amendment is a question of law that we review de novo." *Id.* (citation and internal quotation marks omitted). We accept a state court's determination of state law as conclusive. *Nelson v. Warden of Kan. State Penitentiary,* 436 F.2d 961, 962 (10th Cir. 1971) (citations omitted).

The district court held that although the consent obtained from the Kansas Officers was voluntary under the Fourth Amendment, that consent nonetheless was invalid and constitutionally infirm because the Kansas Officers did not, as a threshold matter, have authority under Oklahoma law to request Defendant's consent. *Sawyer,* No. 03-CR-145-H, slip op. at 14, App. 236. The district court recognized that compliance with the Fourth Amendment is a question of federal, and not state, law and that "violation of state law does not render the search *per se* unreasonable" under the Fourth Amendment.[3] *Id.* at 9, App. 231. The district court explained, however, that "state law informs the question of whether the consent obtained by the Kansas officers, in violation of law, was valid," because "[i]f state law does not control the consequences of the unlawful behavior of the Kansas officers, the state of Oklahoma will have seen its laws disregarded by law enforcement officers that it did not authorize and that it cannot sanction." *Id.* at 11, App. 233. The district

[3] The Oklahoma Court of Criminal Appeals determined that the Kansas Officers lacked authority to request consent to search Defendant's business. *Sawyer,* 92 P.3d at 709-10, App. 181-82. Based upon the Oklahoma court's holding, the district court properly concluded that "[t]he act of the Kansas officers in requesting [Defendant's] consent to search was clearly contrary to Oklahoma law, and the consent to search given by [Defendant] is therefore invalid under Oklahoma law." *Sawyer,* No. 03-CR-145-H, slip. op. at 8, App. 230 (citations omitted).

court concluded that the "Kansas officers could not lawfully request consent," and that the consent obtained therefore was invalid under the Fourth Amendment. *Id.* at 11, 14, App. 233, 236. We review the district court's conclusion of law *de novo* and reverse.

The federal test for determining the validity of consent to search does not require a district court to consider whether a law enforcement officer has authority under state law to request consent. Rather, the federal test for determining the validity of consent to search requires a factual determination based upon the totality of the circumstances of whether the consent was the product of an "essentially free and unconstrained choice by [the] maker" or whether it was the product of "duress or coercion, express or implied." *Schneckloth,* 412 U.S. at 225, 227. Factors to consider within the federal totality of the circumstances test include physical mistreatment, use of violence, threats, promises, inducements, deception, trickery, or an aggressive tone, the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons. *See United States v. Pena,* 143 F.3d 1363, 1367 (10th Cir. 1998); *United States v. Rosborough,* 366 F.3d 1145, 1149 (10th Cir. 2004) (citation omitted). Whether an officer reads a defendant his *Miranda* rights, *see, e.g., United States v. Dozal,* 173 F.3d 787, 796 (10th Cir. 1999), obtains consent pursuant to a claim of lawful authority, *see, e.g., Bumper,* 391 U.S. at 548-49, or informs a defendant of his or her right to refuse consent, *Schneckloth,* 412 U.S. at 227, also are factors to consider in determining whether consent given was voluntary under the totality of the circumstances. The federal totality of circumstances test does not require an analysis of the legal parameters of the

Kansas Officers' jurisdictional authority under state law. *See, e.g., United States v. Little,* 18 F.3d 1499, 1503 (10th Cir. 1994) (the totality of the circumstances test is "*fact* specific" – *i.e.,* based upon on "'all the circumstances surrounding the encounter'") (emphasis added); *see also Schneckloth,* 412 U.S. at 233 (to determine whether consent is voluntary, a court must "analyz[e] all of the circumstances of an individual consent"). Accordingly, the district court erred in finding the consent, although voluntary under the Fourth Amendment, nonetheless invalid.

The district court erroneously relied upon our holding in *Marshall v. Columbia Lea Regional Hospital,* 345 F.3d 1157 (10th Cir. 2003), in support of its decision. In *Marshall,* police officers conducted a blood test without obtaining a warrant. *Id.* at 1161. In a subsequent Section 1983 suit, the state argued, and the district court agreed, that probable cause and exigent circumstances rendered the blood test reasonable under the Fourth Amendment. *See id.* at 1171. The federal test for exigent circumstances asks in part whether a state assigns a high level of interest to the evidence the government seeks to admit. *Id.* at 1175 (citations omitted). Because the federal test requires us to consider state interests, we properly looked to New Mexico law as an indicator of state interests. We concluded that because New Mexico law banned compulsory blood testing, with or without a warrant, in misdemeanor cases involving no physical injuries, the federal exigent circumstances exception did not logically apply. *Id.* at 1174, 1176, 1181. We therefore reversed the decision of the district court and held that the warrantless blood test violated the Fourth Amendment. *Id.*

In *Marshall,* because the federal exigent circumstances test requires a balancing of state interests and the New Mexico statute banned the compulsory blood testing at issue, state law was highly determinative of the federal question. The district court here, drawing a faulty analogy to *Marshall,* however, held that Oklahoma consent law is similarly determinative of the operation of the federal consent test. Specifically, the district court explained, in *Marshall* "the state had the authority to regulate what constituted exigency, although the operation of the exigent circumstances exception was measured by federal law." *Sawyer,* No. 03-CR-145-H, slip. op. at 12, App. 234; *see also id.* (quoting *Marshall,* 345 F.3d at 1175 ("'Our point is not that the Hobbs Defendants are subject to liability under § 1983 for violation of the New Mexico statute, but rather that the New Mexico statute determines whether . . . exigent circumstances . . . are present here.'")). From here, the district court reasoned that "in the instant case, the state has the authority to regulate the conduct of law enforcement officers, including the authority to prohibit them from securing consent to search when outside their jurisdiction," even though the operation of the consent is determined by federal law. *Id.* (citations omitted).

Unlike *Marshall,* this case does not involve an "exigent circumstances" analysis that requires a court to weigh a state's interest against the rights of an individual defendant. *See, e.g., Marshall,* 345 F.3d at 1175. Instead, it involves a "consent" analysis that does not require an examination of state law or state interests. The relevant consent inquiry is whether the consent was "unequivocal and specific and freely and intelligently given," or whether the police "coerce[d] the defendant into granting . . . consent." *United States v. Pena-Sarabia,* 297 F.3d 983, 986

(10th Cir. 2002); *see also Schneckloth,* 412 U.S. at 225, 227. The application of the validity of consent test requires us to examine such facts and circumstances as physical mistreatment, use of violence, threats, threats of violence, promises or inducements, deception or trickery, the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons within the totality of the circumstances. *See, e.g., Pena-Sarabia,* 297 F.3d at 987; *Rosborough,* 366 F.3d at 1149. The application does not require us, as a threshold matter, to examine the officers' compliance with Oklahoma's law for obtaining valid consent, and therefore easily is distinguishable from the exigent circumstances test applied in *Marshall.*

For the same reason, Defendant's reliance upon *United States v. Ibarra,* 955 F.2d 1405 (10th Cir. 1992), is not persuasive. In *Ibarra,* we affirmed the district court's decision to grant a motion to suppress evidence seized during the search of a vehicle impounded in violation of state law. *Id.* at 1409. We considered state law in *Ibarra* because inventory searches involve a special incorporation of state law into Fourth Amendment jurisprudence. Specifically, an inventory search without probable cause of an impounded vehicle is lawful under the Fourth Amendment if the impoundment is pursuant to a state statute or administrative procedure that authorizes the impoundment and satisfies certain constitutional requisites. *See, e.g., Florida v. Wells,* 495 U.S. 1, 4-5 (1990); *Colorado v. Bertine,* 479 U.S. 367, 371, 374 (1987); *South Dakota v. Opperman,* 428 U.S. 364, 369-71, 376 (1976). In *Ibarra,* the state statute did not authorize impoundment of the vehicle, and therefore the search did not come within the inventory-search exception to the probable cause requirement. *Ibarra,*

955 F.2d at 1409. In contrast, the search in this case relies upon Defendant's consent, and the federal consent test does not depend upon state-law authorization.

Although state law or state interests are not highly determinative of the outcome of the federal injury here, as they were in *Marshall* or *Ibarra,* compliance with state law nonetheless may be relevant to the question whether Defendant's consent was valid under the Fourth Amendment. *Cf. United States v. Mikulski,* 317 F.3d 1228, 1232 (10th Cir. 2003) ("the question of compliance with state law may well be relevant in determining whether police conduct was reasonable for Fourth Amendment purposes") (citation and internal quotation marks omitted). We therefore must determine whether the Kansas Officers' actions in contravention of state law amounted to a federal violation.

The undisputed record indicates that Detective Brown informed Defendant that he was not under arrest and that Detectives Brown and Cross did not have authority to arrest him. Detective Brown further advised Defendant of his *Miranda* rights. Detective Brown asked for and received permission to speak with Defendant, asked for and received a written statement from Defendant, and asked for and received written permission to search Defendant's motorcycle shop. The Kansas Officers did not escort Defendant in their police vehicle to Defendant's motorcycle shop, but rather entered their own vehicle and followed Defendant, who drove his own vehicle, to the shop. There is no evidence in the record that the Kansas Officers, during any portion of their encounter with Defendant, used physical touching, violence, threats, promises, inducements, deception, trickery or an aggressive tone, or that Defendant's physical or mental condition rendered

him unable to consent knowingly and intelligently. There also is no indication in the record that Defendant granted consent in submission to a claim of lawful authority – *i.e.*, a claim by the Kansas Officers that they could search the premises even without Defendant's consent. Moreover, the record indicates that the Kansas Officers contacted the Bartlesville Police Department as they were concluding the search of the premises and that Bartlesville police officers thereafter were involved in the investigation. *Compare Mikulski*, 317 F.3d at 1233 (in deciding whether a state law violation amounts to a constitutional violation, noting that the officers acting extra-jurisdictionally contacted officers from the appropriate jurisdiction soon after the arrest at issue occurred). On these facts, with no evidence of coercion, we decline to hold that the state law jurisdictional violation rises to a constitutional level sufficient to render the consent invalid.

Our holdings in *United States v. Mikulski*, 317 F.3d 1228 (10th Cir. 2003), and *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990), which the district court relied upon in support of its decision,[4] do not persuade us otherwise. In *Ross v. Neff*, we held that an "arrest made outside the arresting officer's jurisdiction violates the Fourth Amendment." 905 F.2d at 1353-54. In *United States v. Mikulski*, we distinguished *Neff*, explaining that the extra-jurisdictional actions "'concerned the jurisdiction of officers acting between *political subdivisions of the same state*.'" 317 F.3d at 1232 (citations omitted). We concluded that a warrantless arrest outside of an officer's jurisdiction (but within the same

[4] Although the district court did not cite *Ross*, by relying upon our holding in *Mikulski*, the court relied upon our holding in *Ross* by implication.

state), did not rise to a constitutional violation even though it violated state law in part because the officers were acting between political subdivisions of the same state. *Id.* at 1233.

Referring to this distinction in support of its conclusion, the district court explained that "[t]he issue in this case is not limited to one of the 'jurisdiction of officers acting between *political subdivisions of the same state.*'" *Sawyer,* No. 03-CR-145-H, slip. op. at 11, App. 233 (citing *Mikulski,* 317 F.3d at 1232). Rather,

> the state law violation implicates a state's authority to control within its boundaries the behavior of law enforcement personnel from other states, where it has had no say in any initial licensing of personnel and where it will have no say in any subsequent discipline for wrongful conduct. A state's interest in controlling law enforcement personnel within its boundaries is very strong.

*Id.* (citations omitted). Although we agree that Oklahoma's interest in monitoring law enforcement personnel within its boundaries is strong, that interest is not sufficient to elevate this state law violation to a federal constitutional violation. The consent to search obtained here, with no evidence of coercion or duress, is vastly different from the warrantless arrest conducted in *Ross v. Neff. Compare United States v. Green,* 178 F.3d 1099, 1106 (10th Cir. 1999) ("[a] warrantless arrest is vastly different from a warranted search"). Accordingly, we decline to extend *Ross* to the facts of this case.

We also find unpersuasive the district court's argument that suppression is proper here because there was "no *independent* justification for the search" separate from

the consent obtained in violation of state law. *Sawyer,* No. 03-CR-145-H, slip. op. at 13-14, App. 235-36. In support of this conclusion, the district court distinguishes our decisions in *United States v. Green* and *United States v. Mikulski,* reasoning that in those cases we did find a basis independent from the state law violation to deem the search in *Green* and seizure in *Mikulski* constitutional.

In *Green,* officers of the Wichita Police Department on two occasions searched Green's home in Butler County, Kansas, outside of the city limits of Wichita, pursuant to two valid search warrants – one from a Butler County judge and one from a United States Magistrate Judge. *See* 178 F.3d at 1101-03. We held that "even if th[e] officers [were] acting outside their jurisdiction as defined by state law," "there was no federal constitutional violation [because the] officers obtain[ed] a warrant, grounded in probable cause . . . , from a magistrate of the relevant jurisdiction authorizing them to search [the] particular location." *Id.* at 1106. The district court reasoned that in *Green,* the warrants obtained by a neutral judge "justified the searches independent of the officers' state law violation," and that by contrast, here, "there was no independent determination of probable cause and no justification for the search independent of the state law violation." *Sawyer,* No. 03-CR-145-H, slip. op. at 13, App. 235.

Likewise, in *Mikulski,* the district court noted that an independent justification existed for the search, whereas here, the district court explained, "the unlawful acts of the Kansas officers created the relied-upon exception to the Fourth Amendment prohibition against unlawful search and seizure." *Id.* at 14, App. 236. In *Mikulski,* police officers acting outside of their jurisdiction conducted an arrest based upon illegal conduct that the officers observed. *See*

317 F.3d at 1229-30. The observation by the officers, the district court maintained, constituted a basis independent from the state law jurisdictional violation to justify the arrest. *Sawyer,* No. 03-CR-145-H, slip. op. at 13, App. 235. In contrast, the district court explained, here, the sole justification for the search – consent – was obtained in violation of state law. *Id.* at 14, App. 236.

We have never grafted an "independence" requirement onto our jurisprudence concerning state law violations and whether such violations amount to an infringement of federal constitutional rights. The touchstone of our jurisprudence remains whether the conduct in question contravenes the federal constitution. This inquiry does not, and has not, required a separate justification for police conduct "independent" from a state law violation. Such a requirement would render a state law violation conclusive of the federal question absent an independent justification for police conduct. State law is not determinative of the federal question, but rather may or may not be relevant to the determination of the federal question. *See, e.g., Mikulski,* 317 F.3d at 1232. Here, we have held that the state law violation, on the record before us with no evidence of coercion, does not rise to the level of a federal constitutional violation.

The remaining arguments in support of the district court's opinion set forth by Defendant likewise are not persuasive. Specifically, Defendant's reference to *Preston v. United States,* 376 U.S. 364 (1964), in which the Supreme Court held state officers to the same federal standard as federal officers in determining whether their actions violate federal constitutional rights, is not applicable here because Defendant seeks the reverse – *i.e.,* to evaluate federal constitutional rights by state standards. *Id.* at 366

(citation omitted). Likewise, Defendant's references to the full faith and credit and privileges and immunities clauses are not persuasive because Defendant has not demonstrated, and we do not find, that these clauses are relevant to the constitutionality of the consent obtained here. Finally, Defendant's reliance upon *Elkins v. United States*, 364 U.S. 206 (1960), does not have merit because *Elkins* simply stands for the proposition that federal courts must apply federal standards in determining the admissibility of evidence obtained by state law enforcement officers. *Id.* at 223-24.

## IV. Conclusion.

Having carefully reviewed the briefs, the record, and the applicable law, we **REVERSE** the district court's order granting the motion to suppress and **REMAND** the action for further proceedings.[5]

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[5] The Government also argues that we should reverse the district court's order granting the motion to suppress on the grounds that (1) the exclusionary rule does not apply to remedy a violation of a state law, and (2) the exclusionary rule does not apply because the Kansas Officers did not intrude upon an interest protected by the Fourth Amendment. Because we reverse on the ground that the consent obtained was valid under federal law, we need not reach these additional arguments on appeal.

# UNITED STATES COURT OF APPEALS
# FOR THE TENTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellant,<br>v.<br>PAUL MICHAEL SAWYER,<br>also known as Motor Mike,<br>also known as Mike Paul Sawyer,<br>Defendant-Appellee. | No. 05-5002<br>(D.C. No. 03-CR-145-H)<br>Northern District<br>of Oklahoma |

JUDGMENT

Filed March 20, 2006

Before **PORFILIO** and **EBEL**, Circuit Judges, and **HERRERA**, District Judge.

This case originated in the District of Northern Oklahoma and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of Northern Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ [Illegible]
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
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| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 03-CR-145-H |
| MIKE PAUL SAWYER, AKA: MOTOR MIKE, | ) | (Filed Nov. 23, 2004) |
| Defendant. | ) | |

This matter comes before the Court pursuant to Defendant's Motion to Suppress filed November 14, 2003 (Docket No. 9). Evidentiary hearings were held in this matter on December 1, 2003 and December 4, 2003. In addition, a question relevant to the determination of whether the search at issue here was unconstitutional was certified to the Oklahoma Court of Criminal Appeals. A copy of that court's opinion, issued on June 6, 2004, is attached hereto.

Based upon a careful review of the record and the applicable law, the Court hereby enters the following Findings of Fact and Conclusions of Law.

## Findings of Fact

1. In August of 2000 the Lawrence, Kansas Police Department was conducting an investigation into a stolen motorcycle ring.

2. On August 17, 2000, as part of that investigation, Detective M. T. Brown spoke with Brian Finnan in Wichita, Kansas and determined to pursue the investigation by

traveling from Wichita to Bartlesville, Oklahoma to interview Defendant Mike Paul Sawyer.

3. Also, on August 17, 2000, Detective Brown and Detective Jack Cross of the Lawrence, Kansas Police Department (collectively, the "Kansas officers") placed a telephone call to Sergeant Jay Hastings of the Bartlesville Police Department.

4. On August 18, 2000, the Kansas officers traveled to Bartlesville to pursue the investigation.

5. Also, on August 18, 2000, the Kansas officers again called Sergeant Hastings and left a message when they were unable to reach him.

6. The Kansas officers made the decision to travel to Bartlesville. The Bartlesville police did not request that they do so.

7. The Kansas officers went to the Bartlesville Police Department upon their arrival, but no Bartlesville officer joined them. The Bartlesville officers were apparently occupied by some special function occurring in Bartlesville at the time.

8. The Kansas officers next went to Mr. Sawyer's shop at 210 DeBell in Bartlesville, and knocked on the door. There was no answer. They then talked to an individual at a nearby business, who informed them that Mr. Sawyer worked at Reda Pump.

9. The Kansas officers proceeded to Reda Pump, Mr. Sawyer's place of employment, where they informed the manager (or someone in charge) that they needed to speak to Mr. Sawyer.

10. Detective Brown was wearing his badge, his firearm, his handcuffs, his phone, and his pager on his belt.

11. Detective Cross was wearing similar equipment on his belt.

12. The Kansas officers' badges were either presented to the manager (or someone in charge) or seen by the manager (or someone in charge) during their conversation.

13. Based on their conversation, the manager (or someone in charge) made available to the Kansas officers a large conference room located on the business premises and arranged for Mr. Sawyer to be escorted there for an interview.

14. The manager (or someone in charge) directed the Kansas officers to the room, and they sat there and waited for Mr. Sawyer.

15. Mr. Sawyer entered the room with the manager (or someone in charge), who then left.

16. Detective Brown introduced himself and Detective Cross as police officers from Lawrence, investigating crimes that had occurred in their jurisdiction.

17. Detective Brown told Mr. Sawyer that he was not under arrest and that they did not have authority to arrest him.

18. Detective Brown then advised Mr. Sawyer of his Miranda rights, using a blue card issued to the Lawrence, Kansas Police Department by the local district attorney's office.

19. Thereafter, Detective Brown asked Mr. Sawyer if he would speak with them and he said that he would. They talked for approximately an hour.

20. Detective Brown asked Mr. Sawyer if he would be willing to prepare a written statement, and he said that he would.

21. Mr. Sawyer was given a Lawrence, Kansas police Department form on which to write his statement.

22. After Mr. Sawyer finished writing out his statement, Detective Brown asked Mr. Sawyer if they could go to his Bartlesville shop where he conducted a side business of motorcycle motor sales, and Mr. Sawyer agreed to take them there.

23. Mr. Sawyer got into his own car, and the Kansas officers returned to their car and followed him to his shop.

24. Upon arrival at Mr. Sawyer's shop, Mr. Sawyer unlocked the door and let the Kansas officers inside. Once inside, the Kansas officers requested that Mr. Sawyer consent to a search by completing and signing a written consent form.

25. Mr. Sawyer was given an official Lawrence, Kansas Police Department consent form, and Mr. Sawyer signed the form.

26. The Kansas officers explained to Mr. Sawyer that they wanted his consent to search in writing to be formal, so they could have it for the Lawrence, Kansas Police Department records.

27. The Kansas officers began searching the shop, and, when the search was nearly completed, the Kansas

officers contacted the Bartlesville Police Department to request that a camera be brought to the location.

28. Three Bartlesville officers then came to the scene, took photographs and, at the request of the Kansas officers, seized six (6) engines.

29. The Kansas officers took Mr. Sawyer's records from his office and subsequently went to his residence, where they obtained additional records from his wife.

30. Thereafter, Mr. Sawyer was interviewed further by the Kansas officers at the Bartlesville Police Department.

31. At some time between August 19, 2000 and August 23, 2000, the Kansas officers notified the Bartlesville police officers of the results of their examination of the serial numbers on the engines found at Mr. Sawyer's shop. The following day, the Bartlesville officers obtained a search warrant from a state court judge for another search of Mr. Sawyer's shop, using the information obtained by the Kansas officers. That warrant resulted in the seizure of seventeen (17) additional motorcycle motors and other items.

32. The Kansas officers at all times were acting in furtherance of an investigation on behalf of the Lawrence, Kansas Police Department.

33. The Kansas officers did not at any time act, or purport to act, as private citizens or volunteers. Rather, at

all times the Kansas officers represented themselves as acting on official business.[1]

## Conclusions of Law

### A.

1. Both Oklahoma and Kansas statutes prohibit police officers from exercising authority outside their jurisdictions. 11 O.S. 2001, §34-103; Kan. Stat. Ann. §22-2401a(2) (1995). Court decisions from both states underscore that prohibition. Oklahoma cases include *Graham v. State,* 1977 OK CR 1, 560 P.2d 200; *State v. Ramsey,* 1993 OK CR 54, 868 P.2d 709; and *Phipps v. State,* 1992 OK CR 32, 841 P.2d 591. Kansas cases include *State v. Sodders,* 255 Kan. 79, 872 P.2d 736 (1994) and *State v. Mendez*, 275 Kan. 412, 66 P.3d 811 (2003).

2. The Kansas officers were outside their jurisdiction, and "their actions were not authorized by any inter-local

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[1] The United States takes the position that the Kansas officers were not acting under color of law, but rather were acting as private citizens. At the hearing of August 13, 2004, the following exchange occurred:

"The Court: Well, I'm talking about our case. In our case, were these officers acting as private citizens?

"Ms. Alam: Yes, Your Honor.

* * *

"The Court: It's a yes or no. Were they acting as private citizens, you have said yes. Is that the position of –

"Ms. Alam: Because all of their authority over the defendant when they went in to talk to him, as they made clear to him, was they had no legal authority over him. Thus, they were acting as private citizens. And whether their behavior was completely consistent with that of private citizens, doesn't go to whether they were acting under color – well, it does go to that, but it's not determinative of that."

agreement relating to law enforcement." *United States v. Sawyer,* 2004 OK CR 22, ¶ 13, 92 P.3d 707, 710.

3. Oklahoma law proscribes any request for consent to search made by a police officer acting under color of law outside his jurisdiction. *United States v. Sawyer,* 2004 OK CR 22, 92 P.3d 707; *Phipps v. State,* 1992 OK CR 32, 841 P.2d 591.

4. In this case, the Oklahoma Court of Criminal Appeals determined that, if the Kansas officers were acting under color of law, the Kansas officers' conduct in asking for consent to search was proscribed by Oklahoma law. *United States v. Sawyer,* 2004 OK CR 22, 92 P.3d 707.

5. An officer or employee of a state, or one of the political subdivisions thereof will be deemed to be acting under "color of law" as to those deprivations of rights committed in the fulfillment of the tasks and obligations as assigned to him. *Monroe v. Pape*, 365 U.S. 167 (1961). Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state, is action taken "under color of law." *Stringer v. Dilger,* 313 F.2d 536 (10th Cir. 1963). As the Supreme Court has said, "It is clear that under 'color' of 'law' means under 'pretense' of law. . . . Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws v. United States*, 325 U.S. 91, 111 (1945).

6. Acts "under color of law" include acts done with "[t]he appearance or semblance, without the substance, of a legal right. The term usu[ally] implies a misuse of power made possible because the wrongdoer is clothed with the authority of the state." Black's Law Dictionary 260 (7th ed. 1999).

7. As noted in *Martinez v. Colon,* 54 F.3d 980, 986 (1st Cir. 1995) the construct – "acting under color of state law" – rarely depends on any single, easily determinable fact, such as a policeman's garb, *see, e.g., Stengel v. Belcher,* 522 F.2d 438, 441 (6th Cir.1975) (explaining that whether a police officer is "in or out uniform is net controlling") *cert. dismissed,* 429 U.S. 118 (1976), duty status, *see, e.g., Pitchell v. Callan,* 13 F.3d 545, 548 (2d Cir.1994) (explaining that "whether an officer was on or off duty when the challenged incident occurred" is not dispositive); *Stengel,* 522 F.2d at 441 (same), or whereabouts, *see e.g., Delcambre v. Delcambre,* 635 F. 2d 407, 408 (5th Cir. 1981) (per curium) (holding that a police chief's assault on a private citizen was not conducted under color of law even though it occurred at police headquarters). Nor does "acting under color of state law" depend on whether an officer stays strictly within the line of duty, or oversteps it. *See Monroe v. Pape,* 365 U.S. 167, 172 (1961); *Screws v. United States,* 325 U.S. 91, 111 (1945). For instance, a police officer who exercises, but misuses or exceeds, his lawfully possessed authority is generally thought to be acting under color of law. *See, e.g., Gibson v. City of Chicago,* 910 F.2d 1510, 1518 (7th Cir 1990).

8. The Oklahoma Court of Criminal Appeals has held that an officer is not acting as a private person, but is rather acting under color of law, when, as here, his conduct includes displaying his badge and identifying himself as a police officer. *Phipps v. State,* 1992 OK CR 32, 841 P.2d 591.

9. In the instant case, the Court finds that at all relevant times the Kansas officers were acting under color of law. The Lawrence, Kansas Police Department understood the Kansas officers to be carrying out an official

investigation. The Kansas officers understood themselves to be carrying out an official investigation. The Kansas officers carried firearms and displayed police badges, used official Lawrence, Kansas Police Department forms, and introduced themselves as police officers pursuing an official investigation. Those who met with the Kansas officers understood themselves to be participating in an official investigation and therefore responded accordingly by, e.g, submitting to questioning during working hours, permitting an employee time off to be questioned, providing a conference room for questioning, and escorting the employee to the room to be questioned. Clearly, both Mr. Sawyer and the employer would have responded differently if the officers were not acting under the "pretense" of law. *Screws v. United States,* 325 U.S. 91 (1945).

10. The act of the Kansas officers in requesting Mr. Sawyer's consent to search was clearly contrary to Oklahoma law, and the consent to search given by Mr. Sawyer is therefore invalid under Oklahoma law. *United States v. Sawyer,* 2004 OK CR 22, 92 P.3d 707; *Phipps v. State*, 1992 OK CR 32, 841 P.2d 591.

B.

11. It is well-settled in the Tenth Circuit that "in federal prosecutions the test of reasonableness in relation to the Fourth Amendment protected rights must be determined by federal law even though the police actions are those of state police officers." *United States v. Miller,* 452 F.2d 731, 733 (10th Cir. 1971).

12. Whether the search as a whole was unreasonable and a violation of the Fourth Amendment must be measured by federal law, and the accompanying violation of

state law does not render the search *per se* unreasonable. *United States v. Mikulski*, 317 F.3d 1228, 1232 (10th Cir. 2003).

13. The fact that the conduct of the Kansas officers in requesting Mr. Sawyer's consent to search was unlawful informs whether the consent was constitutionally invalid. *United States v. Mikulski*, 317 F.3d 1228, 1232 (10th Cir. 2003) ("[T]he question of compliance with state law may well be relevant in determining whether police conduct was reasonable for Fourth Amendment purposes.") (quoting *United States v. Baker*, 16 F.3d 854, 856 n.1 (8th Cir. 1994)).

14. The Fourth Amendment protects individuals and their property from unreasonable searches and seizures by the government. *United States v. Place*, 462 U.S. 696, 700 (1983).

15. "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961); *see also Groh v. Ramirez*, 540 U.S. 551 (2003). Thus, "[w]hen a search and seizure is challenged as violative of the Fourth Amendment, the burden is on the government to prove its validity." *United States v. Carreon*, 872 F.2d 1436, 1441 (10th Cir. 1989).

16. Evidence obtained by a search and seizure that violates the Fourth Amendment is inadmissible in a criminal trial. *E.g. Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). This exclusionary rule emanates from the Fourth Amendment, not state law, and is a judicial response to a "direct violation of the

constitutional rights of the defendant." *Weeks*, 232 U.S. at 398. "Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

17. The Kansas officers performed a search on Mr. Sawyer's property to which the Fourth Amendment applied. If that search violated the Fourth Amendment, all evidence obtained by it would be inadmissible in Mr. Sawyer's trial.

18. "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is '*per se* unreasonable subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347; 357 (1967)).

19. "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "[A] search of private property without *valid* consent is 'unreasonable' unless it has been authorized by a valid search warrant." *South Dakota v. Opperman*, 428 U.S. 364, 381 (1976) (emphasis added).

20. No other exception to the requirements for both a warrant and probable cause existed in this case. Therefore, if the consent to search given the Kansas officers was invalid, the search itself was illegal, and the fruits of that search are "constitutionally infirm." *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112 (10th Cir. 1998).

21. As noted above, although federal law governs the determination of whether the search as a whole was unreasonable, state law informs the question of whether the consent obtained by the Kansas officers, in violation of law, was valid. The issue in this case is not limited to one of the "jurisdiction of officers acting between *political subdivisions of the same state*," *c.f. United States v. Mikulski,* 317 F.3d 1228, 1232 (10th Cir. 2003) (internal quotations and citations omitted). Rather, the state law violation implicates a state's authority to control within its boundaries the behavior of law enforcement personnel from other states, where it has had no say in any initial licensing of personnel and where it will have no say in any subsequent discipline for wrongful conduct. A state's interest in controlling law enforcement personnel within its boundaries is very strong. *See, e.g., Cabell v. Chavez-Salido,* 454 U.S. 432 (1982) (upholding a citizenship requirement for California peace officers); *United States v. Morrison,* 529 U.S. 598, 613 (2000) (noting states' historical sovereignty over criminal law enforcement). If state law does not control the consequences of the unlawful behavior of the Kansas officers, the state of Oklahoma will have seen its laws disregarded by law enforcement officers that it did not authorize and that it cannot sanction.

22. The Court finds instructive the case of *Marshall v. Columbia Lea Regional Hospital,* 345 F.3d 1157 (10th Cir. 2003). There, police officers, without obtaining a warrant, conducted a blood test. In a subsequent § 1983 suit the state argued that probable cause and exigent circumstances rendered the blood test reasonable under the Fourth Amendment, citing *Schmerber v. California,* 384 U.S. 757 (1966). The Tenth Circuit found that state law prohibited compulsory blood testing, with or without a

warrant, if the crime was a misdemeanor case involving no physical injury. Accordingly, the Tenth Circuit held that the exigent circumstances exception to the Fourth Amendment warrant requirement did not apply; because "[t]he rationale for the exigent circumstances doctrine is to avoid the loss of evidence due to the time required for obtaining a warrant." *Marshall v. Columbia Lea Regional Hospital,* 345 F.3d 1157, 1174 (10th Cir. 2003). In that case, the state had the authority to regulate what constituted exigency, although the operation of the exigent circumstances exception was measured by federal law. "Our point is not that the Hobbs Defendants are subject to liability under § 1983 for violation of the New Mexico statute, but rather that the New Mexico statute determines whether the exigent circumstances recognized in *Schmerber* are present here." *Id.* at 1175. Similarly, in the instant case, the state has the authority to regulate the conduct of law enforcement officers, including the authority to prohibit them from securing consent to search when outside their jurisdiction. *United States v. Sawyer,* 2004 OK CR 22, 92 P.3d 707; *Phipps v. State,* 1992 OK CR 32, 841 P.2d 591.

23. The United States' reliance here on *United States v. Green,* 178 F.3d 1099 (10th. Cir. 1999) is misplaced. In *Green*, officers of the Wichita Police Department on two occasions searched Green's home in Butler County, Kansas, outside the city limits of Wichita. The officers on each occasion obtained a search warrant, once from a Butler County judge, and once from a United States Magistrate Judge. For each search warrant, the issuing judge made in independent determination of probable cause for the search based on the facts and circumstances presented. Each search yielded drugs and drug paraphernalia. Green

argued that the evidence from these searches should be suppressed because the officers were acting outside of their jurisdiction. The government did not contest that the officers were acting outside of their jurisdiction.

The question in *Green* was whether a *warranted* search conducted by officers acting outside their jurisdiction violated the Fourth Amendment. The court held that the warrants were validly obtained through a determination of probable cause by a neutral judge, and therefore such warrants justified the searches independent of the officers' state law violation. By contrast, in the instant case, there was no independent determination of probable cause and no justification for the search independent of the state law violation.

24. The United States' reliance here on *United States v. Mikulski,* 317 F.3d 1228 (10th Cir. 2003) is also misplaced. In *Mikulski,* officers from Utah County, Utah traveled to Salt Lake County, Utah without contacting local law enforcement officers. While waiting outside a house reportedly containing property stolen in Utah County, the officers observed a truck approach the house. They noticed that it was missing a front license plate, in Utah a public offense for which peace officers are authorized to effect an arrest. The officers conducted a "pat-down search" of the driver of the truck, which revealed a concealed weapon. The officers then arrested the driver, and conducted a series of more thorough searches. Mikulski argued that evidence from these searches should be suppressed because the officers were acting outside of their jurisdiction.

*Mikulski* is easily distinguishable from the instant case. *Mikulski* involved an arrest, not a search. Moreover,

the arrest was based on illegal conduct which was observed by the officers and which formed the basis for a lawful arrest under state law. Thus, the observed public offense provided a justification to arrest independent of the fact that the officers were acting outside their jurisdiction. Furthermore, the search incident to that arrest was a proper exception to the Fourth Amendment protection against unreasonable search and seizure. By contrast, in the instant case, there was no *independent* justification for the search. Rather, the unlawful acts of the Kansas officers created the relied-upon exception to the Fourth Amendment prohibition against unlawful search and seizure. An exception to the Fourth Amendment that is based on consent which is unlawfully obtained cannot withstand constitutional challenge.[2]

25. Based upon a careful review of the record and the applicable law, the Court finds that the officers were acting under color of law, and not as private citizens. The request to search was prohibited by the laws of both Kansas and Oklahoma and, therefore, the consent to search was invalid under state law. Accordingly, because there was no search warrant, because the Kansas officers could not lawfully request consent, and because there is no other recognized Fourth Amendment exception supporting a

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[2] *Mikulski* is further distinguishable by the Tenth Circuit's reference in *Mikulski* to the fact that the state (Utah) had previously determined that exclusion would only be a remedy in rare cases where the statute in question had been violated. *United States v. Mikulski*, 317 F.3d 1228, 1233 n. 4. By contrast, Oklahoma's response to the violation at issue here constitutes an unequivocal rejection of the search by the Kansas officers. *United States v. Sawyer*, 2004 OK CR 22, 92 P.3d 707.

warrantless search, the search in this case is constitutionally infirm. Therefore, the fruits of that illegal search cannot be used as evidence in this case. *Wong Sun v. United States,* 371 U.S. 471 (1963); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112 (10th Cir. 1998).

For the reasons set forth above, Defendant's, Motion to Suppress (Docket No. 9) is hereby granted.

IT IS SO ORDERED.

This 23rd day of November, 2004.

/s/ [Illegible]
Sven Erik Holmes, Chief Judge
United States District Court

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**2004 OK CR 22**
**IN THE COURT OF CRIMINAL APPEALS**
**OF THE STATE OF OKLAHOMA**

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| UNITED STATES OF AMERICA, | ) | FOR PUBLICATION |
| Plaintiff, | ) | |
| v. | ) | Case No. CQ 2004-240 |
| MIKE PAUL SAWYER, a.k.a. MOTOR MIKE, | ) | |
| Defendant. | ) | |

**ORDER ANSWERING CERTIFIED QUESTION OF LAW**

(Filed Jun. 8, 2004)

¶1 The Honorable Sven Erik Holmes, Chief Judge for the United States District Court for the Northern

District of Oklahoma, has certified the following question pursuant to the Revised Uniform Certification of Questions of Law Act, 20 O.S.2001, § 1601-1611:

> Whether police officers from Lawrence, Kansas, who identified themselves as police officers to the owner of a building located in Bartlesville, Oklahoma, but informed the owner prior to requesting consent to search that they were from Kansas and without authority to arrest him, could legally conduct such a search in Oklahoma, and whether the fruits of the subsequent search are admissible in evidence, considering that both Oklahoma and Kansas have statutory prohibitions against police officers acting in their official capacities outside their respective jurisdictions?[1]

¶2 The following relevant facts were provided by the certifying court:

In August 2000, two police officers from Lawrence, Kansas (hereafter "Kansas officers"), investigating stolen motorcycles and motors, traveled to Bartlesville, Oklahoma, to interview Defendant. The Kansas officers notified the Bartlesville Police Department they would be coming in to Bartlesville as part of their investigation, but their travel to Oklahoma and investigation was not requested by the Bartlesville Police Department. When the Kansas officers arrived in Bartlesville, they stopped at the Bartlesville Police Department, informed the department they were in the city and the purpose of their visit. The Kansas officers then went to Defendant's place of employment. They were not accompanied by any member of the Bartlesville Police Department.

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[1] *See* 11 O.S.2001, § 34-103; K.S.A. § 22-2401a (2001).

¶3 At Defendant's place of employment, the Kansas officers identified themselves as police officers to Defendant's company manager. Through the manager, the Kansas officers arranged to interview Defendant in a private office located at his place of employment.

¶4 Upon contact with Defendant, the officers identified themselves as Kansas police officers and told Defendant he was not under arrest because they were without authority to arrest him in Oklahoma. The Kansas officers wore street clothes with badges, handcuffs, and firearms on their belts. The Kansas officers read Defendant his *Miranda*[2] rights and interviewed Defendant for about one hour. Defendant provided the officers with both a written and verbal statement.

¶5 After Defendant provided his statement, the Kansas officers asked Defendant to take them to his motorcycle motor sales business in Bartlesville. Kansas officers followed Defendant, who drove in his personal vehicle, to the location of his business. At the shop, at the request of Kansas officers, Defendant unlocked the door and allowed them inside. Once inside, the Kansas officers asked Defendant to sign an official Consent to Search form from the Lawrence Kansas Police Department. Defendant signed the consent form.

¶6 The Kansas officers then searched Defendant's business. Towards the end of their search, after finding numbers on most of the engines, the Kansas officers contacted the Bartlesville Police Department and asked them to bring a camera to the business. Three police

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

officers came to Defendant's business and took photographs. At the request of the Kansas officers and with Defendant's consent, the three Bartlesville police officers removed six engines from Defendant's shop; three had altered serial numbers and three were believed stolen.

¶7 The Kansas officers then obtained consent from Defendant to take records from his residence, and there they obtained additional records from Defendant's wife. Afterwards, Defendant was interviewed again by the Kansas officers at the Bartlesville Police Department.

¶8 Four days later, the Kansas officers notified the Bartlesville Police Department of the results of their investigation/examination of the serial numbers from the engines seized from Defendant's shop. The next day, Bartlesville police officers obtained a search warrant from a judge of the state of Oklahoma for another search of Defendant's shop. Bartlesville police officers executed that warrant and seized additional items which included seventeen motorcycle motors.

¶9 The United States District Court for the Northern District of Oklahoma found at all times the Lawrence Kansas police officers were acting under color of law.

## AUTHORITY TO ANSWER

¶10 Oklahoma adopted the Uniform Certified Question of Law Act in July of 1973. 20 O.S.2001, § 1601. Pursuant to the Act, this Court

> may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling

> decision of the Supreme Court or the Court of Criminal Appeals, constitutional provision, or statute of this state.

20 O.S.2001, § 1602; *see Canady v. Reynolds*, 1994 OK CR 54, ¶ 8, 880 P.2d 391, 393. "This Court has the power to give the present state of the law as well as use the opportunity to create new precedents" when answering a certified question of law. *Moore v. Gibson*, 2001 OK CR 8, ¶ 6, 27 P.3d 483, 485; *Canady*, 1994 OK CR 54, ¶ 12, 880 P.2d at 395. In so doing, we may reformulate or reinterpret a question of law certified to this Court. *Gibson, id.*; *Canady, id.*

## DISCUSSION

¶11 Generally, a police officer's authority cannot extend beyond his jurisdiction. *Graham v. State,* 1977 OK CR 1, ¶¶ 1 13-14, 560 P.2d 200, 203. Recognized exceptions to this general rule are (1) hot pursuit, (2) when one municipality has requested assistance pursuant to 11 O.S.2001, § 34-103, and (3) when an officer is serving an arrest warrant. *Id.*, 1977 OK CR 1, ¶ 14, 560 at 203, *citing United States v. Braggs,* 189 F.2d. 367 (10th Cir. 1951) (hot pursuit); 11 O.S.2001, § 27-113 (service of arrest warrant "any place within this state"); 11 O.S.2001 § 34-103 (requesting assistance from another municipality). Otherwise, once outside the city limits of the municipality by which they are employed, the officer acts as a private citizen with no greater authority than that of a private citizen. *Staller v. State*, 1996 OK CR 48, ¶ 10, 932 P.2d 1136, 1139-1140; *see also State v. Ramsey*, 1993 OK CR 54, ¶ 10, 868 P.2d 709, 712, *Phipps v. State*, 1992 OK CR 32, ¶ 9, 841 P.2d 591, 593.

¶12 This Court's decision in *Phipps* is dispositive of the question certified.[3] In *Phipps,* this Court held a police officer acting outside his jurisdiction may not conduct a consensual search if the consent is obtained while the officer is acting under color of law. *Id.,* 1992 OK CR 32, ¶ 7, 841 P.2d at 593. In *Phipps,* where the officer identified himself as a police officer and showed his badge before obtaining consent to search, we noted:

> [t]here can be no doubt, however, that had a private citizen told appellant they suspected she was transporting marijuana and asked to look in her trunk, appellant would not have let them.

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[3] The dissent claims *Phipps* is inapplicable to this case because the Kansas officers did not actually arrest Defendant. This fact does not make *Phipps* inapplicable. The issue in *Phipps* was the same as that presented here: Is a consent to search, obtained by a police officer acting outside his jurisdiction under color of law, valid? Clearly in *Phipps,* the answer was no, and there is no reason to reach a different result here.

The question presented to this Court concerned the validity of a consent to search obtained by police officers who were acting outside their jurisdiction. For the dissent to describe the Kansas officers' contact with Defendant as a "consensual" encounter requires one to ignore the facts which show these officers at all times acted under color of law and facts from which one can infer the Defendant believed he was dealing with police officers and not private citizens. The United States District Court did not ask this Court whether the Kansas officers could conduct a consensual search; those facts are not before us.

Nothing in *Phipps* or in this decision prohibits officers from other states from conducting investigations outside their jurisdictions. However, at the point such investigation involves a search or an arrest, the law in this State protects its citizens and requires such actions be made by those with authority to conduct the same. Here, the Kansas police officers could not legally conduct the search of Defendant's business premises because they were acting under color of law when they obtained Defendant's consent to search. Because the Defendant's consent was not valid, the fruits of their searches were inadmissible.

> Thus, it is clear that Officer Kinney was acting under color of law and the appellant believed that he had such authority when he asked to search appellant's vehicle. We therefore hold that the search of appellant's car while it was beyond the Tulsa city limits is invalid, and the seizure of the contraband from such search should have been suppressed.

*Id.*, 1992 OK CR 32, ¶ 12, 841 P.2d at 593-594.

¶13 In this case, there is no question that the Kansas officers were outside their jurisdiction. Their actions were not authorized by any interlocal governmental agreement relating to law enforcement, Neither 11 O.S.2001, § 34-103 nor K.S.A. (2001) § 22-2401a mentions or contemplates extending a municipal police officer's jurisdiction from one state to another state.

¶14 Further, the District Court found the officers were "at all times relevant hereto . . . acting under color of law." While the Kansas officers told Defendant they were without authority to arrest him, after they mirandized Defendant and questioned him for over an hour, they asked for consent to search his business and asked him to sign an official Consent to Search form from the Lawrence Kansas police department. A private citizen, acting without official authority, who asks another to search his home or business would not ask such person to also sign a written consent form with a police division name on it. As we noted in *Phipps,* it is highly doubtful a person would sign such a consent under those circumstances. It is evident these officers were not acting as private citizens and, through their display of official authority, they obtained consent to search from Defendant. Such consent, under *Phipps,* was invalid.

¶15 "At some point near the end of the search," the Kansas officers contacted the Bartlesville police department because they needed a camera to photograph items discovered during their search. Again, upon request of the Kansas officers, Defendant consented in writing to allow six engines to be removed from his shop. A few days later, the Kansas officers notified the Bartlesville police officers of the "results of their examination of the serial numbers on the engines found" at Defendant's shop, and the Bartlesville officers used that information to obtain a search warrant.

¶16 Defendant's initial consent for the Kansas officers to search his business was invalid. Any evidence seen or obtained during that search could not be used to establish probable cause in the subsequent affidavit for a search warrant. *State v. Stuart,* 1993 OK CR 29, ¶ 19, 855 P.2d 1070, 1074; *Phipps,* 1992 OK CR 32, ¶ 12, 841 P.2d at 594; *Dale v. State,* 2002 OK CR 1, ¶ 10, 38 P.2d 910, 912 (fruits of search based upon involuntary consent would be suppressed). The evidence seized during the initial search as well as the evidence seized pursuant to the subsequently issued search warrant should be suppressed.

¶17 The Kansas officers' request for assistance from the Bartlesville police department in photographing evidence and their second request for consent before removing items from the business was not a sufficient intervening cause to purge the taint of the initial invalid consent and resulting unlawful search. *See McGaughey v. State,* 2001 OK CR 33, ¶ 40, 37 P.3d 130, 141; *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (original taint of impropriety may be removed by intervening circumstances). Had the Kansas officers not gained entry to Defendant's business under color of law,

they would not have gained entry at all and would not have had the opportunity to see and seize evidence with or without the assistance of the Bartlesville police department. We find no significant intervening factor occurred between the entry based upon invalid consent and any subsequent consent obtained in the presence of the Bartlesville officers "at the request of the Kansas officers."

¶18 Lastly, the facts provided suggest the Bartlesville police department used information gained by the Kansas officers during their search of Defendant's business to obtain a search warrant from a judge of this State for another search of Defendant's business. That search resulted in the seizure of seventeen additional motorcycle motors.

¶19 The evidence obtained pursuant to the search warrant also must be suppressed, because the evidence establishing probable cause for the issuance of the warrant was obtained by the Kansas officers acting under color of law while conducting the unlawful search of Defendant's business. *Lucas v. State*, 1985 OK CR 100, ¶ 11, 704 P.2d 1141, 1142 (evidence seized pursuant to a search warrant was discovered by exploitation of the illegal vehicle search would be suppressed as fruit of the poisonous tree), *Wong Sun*, 371 U.S. at 484, 83 S.Ct. at 416 (exclusionary prohibition of evidence seized during an unlawful search extends to the direct and indirect products of the search). All of the evidence seized during the search of Defendant's business was found as a direct result of actions taken by the Kansas officers while they were acting under color of law.

## ANSWER

¶ 20 For the reasons set forth above, we answer the question submitted as follows: Under Oklahoma law, police officers acting outside their jurisdiction under color of law, cannot legally obtain consent to search. As a result, the fruits of any subsequent search would not be admissible.

¶21 **IT IS SO ORDERED.**

¶22 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 8th day of June, 2004.

/s/ Charles A. Johnson
**CHARLES A. JOHNSON,**
**Presiding Judge**

/s/ Steve Lile Dissenting. I [illegible] in J. Lumpkin's [illegible]
**STEVE LILE, Presiding Judge**

/s/ Gary Lumpkin Dissent (with attached)
**GARY L. LUMPKIN, Judge**

/s/ Charles S. Chapel
**CHARLES S. CHAPEL, Judge**

/s/ Reta M. Strubhar
**RETA M. STRUBHAR, Judge**

ATTEST:

/s/ Michael S. Richie
Clerk

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**LUMPKIN, J.: DISSENTING**

¶1 I must respectfully dissent to the analysis and answer provided to the certified question of law. The issue presented by the fact situation submitted by the United

States District Court for the Northern District of Oklahoma is the ability of an officer to conduct an investigation outside his or her jurisdiction, not affect an arrest. This Court's Order fails to recognize that distinction.

¶2 In Oklahoma, the authority to arrest, either as a. law enforcement officer or a private citizen, is controlled by statute. *See* 22 O.S. 2001, §§ 186-209. It is these statutes that our case law has interpreted with regards to police officers acting outside of their jurisdiction. Now this Court seeks to apply this law relating to arrests to an entirely different area of criminal law procedure, i.e. pre-charging investigation and due process. I submit the Order fails to recognize and, in turn, apply the correct legal analysis to the facts presented.

¶3 Initially, we must recognize that Oklahoma does not have statutes which control the type of pre-charging investigation conducted by the law enforcement officers in this case. Therefore, we must look to state and federal case law for guidance.

¶4 The U.S. Supreme Court, as well as the Tenth Circuit Court of Appeals, has determined, that there are three general types of encounters between citizens and the police. These are: (1) consensual encounters that are not Fourth Amendment *Seizures* since they only involve a person's voluntary cooperation with an officer's non-coercive questioning; (2) investigative detention, which are Fourth Amendment seizures justified only if there is a reasonable suspicion that the person has committed or is committing a crime; and (3) arrests which are Fourth Amendment seizures characterized by highly intrusive or lengthy detention and justified only if there is probable cause to believe that a person has committed or is committing a

crime. *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Hishaw*, 235 F.3d 565, 569 (10th Cir. 2000).

¶5 For the following reasons, this case falls under the category of a consensual encounter between the police and the defendant. In *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), the Supreme Court recognized that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. In analyzing whether a seizure or a consensual encounter has taken place, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter. *Id.*

¶6 In *U.S. v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Supreme Court said:

> Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

446 U.S. at 553-554, 100 S.Ct. at 1877 (internal citations omitted).

¶7 The Tenth Circuit, in *United States v. Zapata*, 997 F.2d 751 (10th Cir.1993), enumerated a number of factors to consider in determining whether a police-citizen encounter becomes a seizure. The court stated that we must look at the location of the encounter, "particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officer; whether and for how long the officers retained the defendant's personal effects, such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent." *Id.*, at 756. *See also United States v. Bloom*, 975 F.2d 1447, 1450 (10th Cir.1992) *overruled on other grounds, United States v. Little*, 18 F.3d 1499, 1504 (10th Cir.1994) (the ultimate issue of whether a seizure occurred is a question of law.)

¶8 An analysis of the above factors indicates that in the instant case a consensual encounter occurred between the Kansas officers and the defendant. First, the encounter occurred in a public setting, the defendant's place of business. The Kansas officers were dressed in plain-clothes. Although they carried badges and weapons there is no indication either was used in a threatening or coercive manner. The officers identified themselves and informed the defendant they had no authority to arrest him. There was no show of force or restraint and the defendant was free to leave. Before talking with the defendant, the officers read him the *Miranda* warning. As the defendant was not in custody, it was not necessary for

the officers to give him the *Miranda* warning. However, the *Miranda* warning did convey to the defendant that he did not have to answer the officers' questions. An analysis of all of these factors clearly establishes that the initial encounter between the defendant and the Kansas officers was consensual.

¶9 After the initial interview, the defendant agreed to the officers' request to take them to his motorcycle motor sales business. The defendant drove separately, in his own vehicle, to the business, with the officers following behind. Once there the defendant agreed to sign a consent to search form. As with the giving of the *Miranda* warning, it was not necessary for the officers to have obtained a signed consent form. As the Supreme Court stated in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973):

> . . . when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact *249 to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

412 U.S. at 248-249, 93 S. Ct. at 2059.

¶10 The Supreme Court also said:

> While the Fourth and Fourteenth Amendments limit the circumstances under which the police

> can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search. . . . And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment. We have only recently stated: '(I)t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.' Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

412 U.S. at 242-243, 93 S.Ct. at 2056. (internal citations omitted).

¶11 In this case, there is no evidence of any inherently coercive tactics – either from the nature of the police questioning or the environment in which it took place. The search took place at the defendant's place of business. "Since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite." *Schneckloth*, 412 U.S. at 247, 93 S.Ct. at 2058. There is no reason to believe, under circumstances such as are present here, that the defendant's responses to the officers' questions was presumptively coerced. Therefore, there is no reason to reject the traditional test for determining the voluntariness of the defendant's response. Here, the record before us clearly establishes the defendant's consent for the officers' search was voluntary.

¶12 The original question posed to this Court from judge Holmes focused on whether the conduct of the Kansas officers was legal as they were acting outside of their jurisdiction. The issue of the exercise of a police officer's authority outside his/her jurisdiction has usually been addressed by the courts in the context of the officer's authority to affect an arrest. *See Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2527, 45 L.Ed.2d 607 (1975); *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). *See also U.S. v. Green*, 178 F.3d 1099 (10th Cir.1999); *Staller v. State*, 1996 OK CR 48, 932 P.2d 1136; *State v. Stuart*, 1993 OK CR 29, 855 P.2d 1070; *Phipps v. State*, 1992 OK CR 32, 841 P.2d 591; *Graham v. State*, 1977 OK CR 1, 560 P.2d 200.

¶13 However, that is not the issue in the present case, as the arrest was made by the local Bartlesville Police, not the Kansas Officers. For that reason, *Phipps* is inapplicable.[1]

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[1] Further, this case is more consistent and a natural extension of our decision in *Staller*. In *Staller*, officers arranged for a confidential informant to contact suspected drug dealers to schedule some "buy/walk" drug sales. The confidential informant contacted the appellant and agreed to buy illegal drugs from him. 932 P 2d at 1139. This type of active participation in the arranging of a controlled drug buy is different from the investigative actions of the Kansas officers in the present case. In the present case, the crime had already been committed by the time the Kansas officers arrived in Bartlesville. In *Staller*, the crime had yet to be committed when the officers acted out of their jurisdiction. However, we find that sequence of events did not deprive the officers of the ability to obtain information and make observations that led to probable cause necessary for an arrest warrant. *Id.* at 1140.

¶14 Here, the Kansas officers were conducting an investigation into stolen motorcycles and motors. As such, their questioning of the defendant was investigatory and not accusatory. In *Escobedo v. Illinois*, 378 U.S. 478, 492, 84 S.Ct. 1758, 1766, 12 L.Ed.2d 977 (1964), the United States Supreme Court said:

> . . . Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' . . . by gathering information from witnesses and by other 'proper investigative efforts'. . . . We hold only that when the process shifts from investigatory to accusatory – when its focus is on the accused and its purpose is to elicit a confession – our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

378 U.S. at 492, 84 S.Ct. at 1766 (internal citations omitted). *See also Spano v. New York*, 360 U.S. 315, 327, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).

¶15 While the Kansas officers were admittedly acting outside their jurisdiction by interviewing the defendant in Bartlesville, Oklahoma, there is no legal prohibition to their questioning of the defendant in a consensual encounter.

¶16 In our previous state cases, this Court has held that officers acting outside their jurisdiction act as private citizens. *See also Horn v. City of Seat Pleasant, Md.*, 57 F. Supp.2d 219, 225 (D.Md.1999) ("an officer acting beyond his jurisdiction loses his cloak of authority.") Here, the Kansas officers clearly informed the defendant they had no authority over him. Viewing the officers' actions as those of private citizens, they are perfectly legal. There is

nothing illegal about private citizens asking each other questions and asking to look around their place of business. This Court's Order states that a private citizen would not ask another citizen to sign a written consent form with a police division name on it. That is probably true, but the written consent form does not raise this situation to the accusatory level where constitutional safeguards kick in. The written consent form, just like the *Miranda* warning, is a "red herring" in this case which appear to have been given by the officers only out of an abundance of caution. However, neither the consent form nor the *Miranda* warning contributes to a coercive atmosphere where the defendant was forced to sign the consent to search. As discussed above, the consent to search was given voluntarily.

¶17 Accordingly, the encounter between the Kansas officers and the defendant was consensual, and the defendant's consent to search voluntarily given. Therefore, there has not been a Fourth Amendment violation and the evidence seized in the search is admissible at trial. *See U.S. v. Green*, 178 F.3d 1099, 1105 (10th Cir. 1999).

¶18 Based upon this analysis, I believe the descriptive term "acting as a private citizen" has been overused, and to a degree misused when analyzing the role of law enforcement in our mobile society. Its use has been unknowingly wrongly extended merely because Oklahoma has a statute relating to "arrests" by private citizens. Now is the time to recognize the distinct difference between the investigation stage and the prosecution stage in the criminal process. Every day of the week law enforcement personnel are moving across jurisdictional lines of demarcation following leads on evidence. That is the nature of crime. Criminals do not stay in clearly marked city, county,

or state boundaries. Investigating officers should be able to follow where the evidence leads. The issue is then one of due process. Did the officer follow the rules? Did he or she inform the defendant and obtain a valid, knowing, voluntary consent, or go to local law enforcement and obtain a valid search warrant? The officers in the present case did everything right. The defendant's due process rights were protected. Local authorities were informed and utilized at the appropriate time. There is no legal basis for excluding the evidence in this case.

¶19 I am authorized to state Judge Lile joins in this analysis and vote.

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 03-CR-145-H |
| MIKE PAUL SAWYER, a.k.a. MOTOR MIKE, | ) | |
| Defendant. | ) | |

**ORDER CERTIFYING A QUESTION OF STATE LAW**

(Filed Mar. 10, 2004)

The Court has determined that this action presents an unresolved question of Oklahoma law. Pursuant to the Revised Uniform Certification of Questions of Law Act, Title 20, Okla. Stat. (1997) §§ 1601-1611, the Court on its own motion, orders certification of the question presented herein to the Oklahoma Court of Criminal Appeals. The circumstances presented by this action present questions of Oklahoma law that may be dispositive in the case pending before this Court, and the question certified is one which has not been determined by the decisions of the Oklahoma Court of Criminal Appeals.

IT IS THEREFORE ORDERED THAT

1. The following question is certified to the Oklahoma Court of Criminal Appeals:

   Whether police officers from Lawrence, Kansas, who identified themselves as police officers to the

owner of a building located in Bartlesville, Oklahoma, but informed the owner prior to requesting consent to search that they were from Kansas and without authority to arrest him, could legally conduct such a search in Oklahoma, and whether the fruits of the subsequent search are admissible in evidence, considering that both Oklahoma and Kansas have statutory prohibitions against police officers acting in their official capacities outside their respective jurisdictions?[1]

2. The following statement contains the facts relevant to the certified question:

On August 18, 2000, two (2) police officers from the Lawrence, Kansas Police Department traveled to Bartlesville, Oklahoma, as part of an investigation into stolen motorcycles and motors, to interview the Defendant, Mr. Sawyer, concerning any knowledge he might have. The Lawrence officers initiated the travel without any request of the Bartlesville police. However, they contacted the Bartlesville Police Department and advised them they would be traveling to their city regarding the investigation. Upon their arrival in Bartlesville, the Lawrence officers stopped by the Bartlesville Police Department and informed them they were in the city, and the purpose of the visit, but no Bartlesville officers accompanied the Lawrence officers to the point of the initial contact by reason of some social function occurring in Bartlesville at the time. The Lawrence officers went to the Defendant's place of employment, identified themselves as police officers, and arranged with the company manager, to have a private

[1] 11 Okla. Stat. § 34-103; Kan. Stat. § 22-2401a

interview with Mr. Sawyer in a private office located on the business premises. The Court has found that, at all times relevant hereto, the Lawrence officers were acting under color of law.

Upon initial contact with the Defendant, the Kansas officers identified themselves as police officers and advised him he was not under arrest because they were Kansas officers and had no authority as such in Oklahoma. The Lawrence officers were dressed in street clothes with badges, handcuffs, and firearms on their belts. After being advised of his *Miranda* rights, Mr. Sawyer gave a statement to the police both verbally and in writing. The interview took approximately one hour. Thereafter, the Lawrence Officers requested that Mr. Sawyer take them to his shop in Bartlesville, where he conducted a side business of motorcycle motor sales. Mr. Sawyer left his place of employment, and drove his personal vehicle to the location of his shop while the Lawrence officers followed. At the shop, Mr. Sawyer, at the request of the officers, unlocked the door and allowed the officers inside. Inside an office within the shop, the Lawrence officers presented Mr. Sawyer with an official Consent to Search form from the Lawrence, Kansas Police Department, which Mr. Sawyer signed. Thereafter, the officers began to search the shop. At some point near the end of the search, after finding numbers on most of the engines, the Kansas officers contacted the Bartlesville Police Department and requested they bring a camera to the location. Three (3) Bartlesville officers came to the scene, took photographs and, with the written consent of Mr. Sawyer and at the request of the Kansas officers, seized six (6) engines. Three (3) of the

engines had altered serial numbers and the other three (3) were believed stolen.

The Lawrence officers were given consent by Mr. Sawyer to take records from his residence, where they obtained additional records, with the consent of his wife, relating to the investigation. Thereafter, Mr. Sawyer was interviewed further at the Bartlesville Police Department by the Lawrence officers.

On August 22, 2000, the Lawrence officers notified the Bartlesville officers of the results of their examination of the serial numbers on the engines found at Mr. Sawyer's shop. The following day, the Bartlesville police officers obtained a search warrant from a state court judge for another search of Mr. Sawyer's shop. That warrant resulted in the seizure of seventeen (17) additional motorcycle motors, among other items of evidence.

3. This Court acknowledges that the Oklahoma Court of Criminal Appeals may reformulate the question of law.

4. The names and addresses of the counsel of record are as follows, to wit:

For the Government:

Shannon L. Henson
Assistant United
States Attorney
United States Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918)581-7463

For the Defendant:

Stanley D. Monroe
Monroe & Associates
15 W. 6th Street
Bank of America,
Suite 2112
Tulsa, Oklahoma 74119
(918)592-1144

5. The Clerk of this Court shall forward a copy of this Order to the Clerk of the Oklahoma Court of Criminal Appeals.

IT IS SO ORDERED.

This 9th day of March, 2004.

/s/ Sven Erik Holmes
Sven Erik Holmes, Chief Judge,
United States District Court

**Oklahoma Statutes Citationized**
**Title 11. Cities and Towns**
**Chapter 1 – Municipal Code**
**Article Article XXXIV – Police Departments**
**Section 34-103 – Performance of Police Functions in Other Municipalities Under Emergency Situations.**

Cite as: O.S. § , ___ ___

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A. Members of the regular police department of any municipality, upon request of the mayor or a designee, or chief of police or a designee, of any other municipality, may serve as police officers in the municipality requesting their assistance upon approval of the governing body of the municipality where such officers are regularly employed. While so serving in another municipality, such police officers shall have the same powers and duties as though employed by the municipality where such duties are performed; except that salaries, insurance and other benefits shall be provided in their regular manner by the municipality in which the police officers are regularly employed.

B. Members of the regular police department of any municipality, upon request of a county sheriff or a designee, or upon request by a member of the Oklahoma Highway Patrol, may serve as law enforcement officers for the sheriffs office or the Oklahoma Highway Patrol, respectively, if such service has been authorized by prior resolution by the governing body of the municipality where such officers are regularly employed. While so serving, such police officers shall have the same powers and duties as though employed by the requesting law enforcement agency and when so acting they shall be deemed to be

acting within the scope of employment of the requesting law enforcement agency; except that salaries, insurance and other benefits shall be provided in their regular manner by the municipality in which the police officers are regularly employed.

C. Members of the regular police department of any municipality may be deputized by the county sheriff or a designee subject to an interlocal governmental agreement to combine city and county law enforcement efforts and to encourage cooperation between city and county law enforcement officials. Liability for the conduct of any municipal police officers deputized under the terms and conditions of an interlocal governmental agreement shall remain the responsibility of their municipal employer.

D. The governing body of a municipality may, by resolution, authorize the chief executive officer of the municipality to respond to any request from any other jurisdiction within the state for law enforcement assistance in cases of emergency. The police officers of the municipality serving in response to the emergency request shall have the same powers and duties as though employed by the requesting law enforcement agency and when so acting they shall be deemed to be acting within the scope of employment of the requesting law enforcement agency; provided, however, that salaries, insurance and other benefits shall be provided in the regular manner by the municipality in which the police officers are regularly employed.

As used in this section, "emergency" means a sudden and unforeseeable occurrence or condition either as to its onset or its extent of such severity or magnitude that immediate response or action is necessary to assist law enforcement

agencies having jurisdiction at the scene of the emergency to carry out their functions.

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**22-2401a**
**Chapter 22. – CRIMINAL PROCEDURE**
**KANSAS CODE OF CRIMINAL PROCEDURE**
**Article 24. – ARREST**

**22-2401a. Jurisdiction; law enforcement officers; tribal law enforcement agency, liability insurance required, when.** (1) Law enforcement officers employed by consolidated county law enforcement agencies or departments and sheriffs and their deputies may exercise their powers as law enforcement officers:

(a) Anywhere within their county; and

(b) in any other place when a request for assistance has been made by law enforcement officers from that place or when in fresh pursuit of a person.

(2) Law enforcement officers employed by any city may exercise their powers as law enforcement officers:

(a) Anywhere within the city limits of the city employing them and outside of such city when on property owned or under the control of such city; and

(b) in any other place when a request for assistance has been made by law enforcement officers from that place or when in fresh pursuit of a person.

(3)(a) Law enforcement officers employed by a Native American Indian Tribe may exercise powers of law enforcement officers anywhere within the exterior limits of

the reservation of the tribe employing such tribal law enforcement officer, subject to the following:

(i) The provisions of subsection (3)(a) shall be applicable only if such Native American Indian Tribe has entered into a valid and binding agreement with an insurance carrier to provide liability insurance coverage for damages assessed in state or federal court and arising from the acts, errors or omissions of such tribal law enforcement agency or officer while acting pursuant to this section. Such insurance policy shall be in an amount not less than $500,000 for any one person and $2,000,000 for any one occurrence for personal injury and $1,000,000 for any one occurrence for property damage and shall carry an endorsement to provide coverage for mutual aid assistance. Such insurance policy shall be subject to verification by the attorney general. Such insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy set forth herein.

(ii) The provisions of subsection (3)(a) shall be applicable only if such Native American Indian Tribe has filed with the county clerk a map clearly showing the boundaries of the Tribe's reservation as defined in this section.

(b) If a claim is brought against any tribal law enforcement agency or officer for acts committed by such agency or officer while acting pursuant to this section, such claim shall be subject to disposition as if the tribe was the state pursuant to the Kansas tort claims act, provided that such act shall not govern the tribe's purchase of insurance. The tribe shall waive its sovereign immunity solely to the extent necessary to permit recovery under the liability insurance, but not to exceed the policy limits.

(c) Nothing in this subsection (3) shall be construed to prohibit any agreement between any state, county or city law enforcement agency and any Native American Indian Tribe.

(d) Nothing in this subsection (3) shall be construed to affect the provision of law enforcement services outside the exterior boundaries of reservations so as to affect in any way the criteria by which the United States department of the interior makes a determination regarding placement of land into trust.

(e) Neither the state nor any political subdivision of the state shall be liable for any act or failure to act by any tribal law enforcement officer.

(4) University police officers employed by the chief executive officer of any state educational institution or municipal university may exercise their powers as university police officers anywhere:

(a) On property owned or operated by the state educational institution or municipal university, by a board of trustees of the state educational institution, an endowment association, an athletic association, a fraternity, sorority or other student group associated with the state educational institution or municipal university;

(b) on the streets, property and highways immediately adjacent to the campus of the state educational institution or municipal university;

(c) within the city where such property as described in this subsection is located, as necessary to protect the health, safety and welfare of students and faculty of the state educational institution or municipal university, with appropriate agreement by the local law enforcement

agencies. Such agreements shall include provisions defining the geographical scope of the jurisdiction conferred, circumstances requiring the extended jurisdiction, scope of law enforcement powers and duration of the agreement. Any agreement entered into pursuant to this provision shall be approved by the governing body of the city or county, or both, having jurisdiction where such property is located, and the chief executive officer of the state educational institution or municipal university involved before such agreement may take effect; and

(d) additionally, when there is reason to believe that a violation of a state law, a county resolution, or a city ordinance has occurred on property described in subsection (4)(a) or (b), such officers with appropriate notification of, and coordination with, local law enforcement agencies or departments, may investigate and arrest persons for such a violation anywhere within the city where such property, streets and highways are located. Such officers also may exercise such powers in any other place when in fresh pursuit of a person. University police officers shall also have authority to transport persons in custody to an appropriate facility, wherever it may be located. University police officers at the university of Kansas medical center may provide emergency transportation of medical supplies and transplant organs.

(5) In addition to the areas where law enforcement officers may exercise their powers pursuant to subsection (2), law enforcement officers of any jurisdiction within Johnson or Sedgwick county may exercise their powers as law enforcement officers in any area within the respective county when executing a valid arrest warrant or search warrant, to the extent necessary to execute such warrants.

(6) In addition to the areas where university police officers may exercise their powers pursuant to subsection (4), university police officers may exercise the powers of law enforcement officers in any area outside their normal jurisdiction when a request for assistance has been made by law enforcement officers from the area for which assistance is requested.

(7) In addition to the areas where law enforcement officers may exercise their powers pursuant to subsection (2), law enforcement officers of any jurisdiction within Johnson county may exercise their powers as law enforcement officers in any adjoining city within Johnson county when any crime, including a traffic infraction, has been or is being committed by a person in view of the law enforcement officer. A law enforcement officer shall be considered to be exercising such officer's powers pursuant to subsection (2), when such officer is responding to the scene of a crime, even if such officer exits the city limits of the city employing the officer and further reenters the city limits of the city employing the officer to respond to such scene.

(8) Campus police officers employed by a community college or school district may exercise the power and authority of law enforcement officers anywhere:

(a) On property owned, occupied or operated by the school district or community college or at the site of a function sponsored by the school district or community college;

(b) on the streets, property and highways immediately adjacent to and coterminous with property described in subsection (8)(a);

(c) within the city or county where property described in subsection (8)(a) is located, as necessary to protect the health, safety and welfare of students and faculty of the school district or community college, with appropriate agreement by local law enforcement agencies. Such agreements shall include provisions, defining the geographical scope of the jurisdiction conferred, circumstances requiring the extended jurisdiction, scope of law enforcement powers and duration of the agreement. Before any agreement entered into pursuant to this section shall take effect, it shall be approved by the governing body of the city or county, or both, having jurisdiction where such property is located, and the board of education or board of trustees involved;

(d) with appropriate notification of and coordination with local law enforcement agencies, within the city or county where property described in subsection (8)(a) or (8)(b) is located, when there is reason to believe that a violation of a state law, county resolution or city ordinance has occurred on such property, as necessary to investigate and arrest persons for such a violation;

(e) when in fresh pursuit of a person; and

(f) when transporting persons in custody to an appropriate facility, wherever it may be located.

(9) As used in this section:

(a) "Law enforcement officer" means: (1) Any law enforcement officer as defined in K.S.A. 22-2202, and amendments thereto; or (2) any tribal law enforcement officer who is employed by a Native American Indian Tribe and has completed successfully the initial and any subsequent law

enforcement training required under the Kansas law enforcement training act.

(b) "University police officer" means a police officer employed by the chief executive officer of: (1) Any state educational institution under the control and supervision of the state board of regents; or (2) a municipal university.

(c) "Campus police officer" means a school security officer designated as a campus police officer pursuant to K.S.A. 72-8222, and amendments thereto.

(d) "Fresh pursuit" means pursuit, without unnecessary delay, of a person who has committed a crime, or who is reasonably suspected of having committed a crime.

(e) "Native American Indian Tribe" means the Prairie Band Potawatomi Nation, Kickapoo Tribe in Kansas, Sac and Fox Nation of Missouri and the Iowa Tribe of Kansas and Nebraska.

(f) "Reservation" means:

(i) With respect to the Iowa Tribe of Kansas and Nebraska, the reservation established by treaties with the United States concluded May 17, 1854, and March 6, 1861;

(ii) with respect to the Kickapoo Nation, the reservation established by treaty with the United States concluded June 28, 1862;

(iii) with respect to the Prairie Band Potawatomi Nation in Kansas, the reservation established by treaties with the United States concluded June 5, 1846, November 15, 1861, and February 27, 1867; and

(iv) with respect to the Sac and Fox Nation of Missouri in Kansas and Nebraska: (A) the reservation established by treaties with the United States concluded May 18, 1854, and March 6, 1861, and by acts of Congress of June 10, 1872 (17 Stat. 391), and August 15, 1876 (19 Stat. 208), and (B) the premises of the gaming facility established pursuant to the gaming compact entered into between such nation and the state of Kansas, and the surrounding parcel of land held in trust which lies adjacent to and east of U.S. Highway 75 and adjacent to and north of Kansas Highway 20, as identified in such compact.

(10) The provisions of subsection (3) and subsections (9)(a)(2), (9)(d) and (9)(e) shall expire on July 1, 2009.